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In the Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

35pp

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QUESTIONS PRESENTED

1. Whether private collective intrastate rate agreements among motor carriers, which are not compelled by state law, are "state action" and therefore not subject to the Sherman Act.

2. Whether the *Noerr-Pennington* doctrine immunizes such private agreements from the Sherman Act because the rates agreed upon are subsequently submitted to state regulatory authorities.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 63a-93a) is reported at 702 F.2d 532. The panel opinion of the court of appeals (Pet. App. 31a-60a) is reported at 672 F.2d 469. The opinion of the district court (Pet. App. 1a-30a) is reported at 467 F. Supp. 471. The judgment entered by the district court (App., *infra*, 1a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1983. The petition for a writ of certiorari was filed on May 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Southern Motor Carriers Rate Conference, Inc. (SMCRC) and North Carolina Motor Carriers Association, Inc. (NCMCA), and respondent Motor Carriers Traffic Association (MCTA), all of which were defendants in the district court, are motor carrier rate bureaus. Their members are motor carriers, many of which compete with each other. The bureaus provide a forum for competing member carriers to discuss and agree on intrastate motor carrier rates, which are then submitted to state public service commissions for approval. The bureaus also perform several other functions that are not involved in this case: they publish tariffs and supplements containing the rates agreed upon, and they provide counsel, staff experts, and facilities for the preparation of cost studies and other types of exhibits and testimony for use in support of proposed rates at state regulatory commission hearings. Pet. App. 63a-64a.[1]

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[1] SMCRC performs rate bureau functions with respect to intrastate motor common carrier rates for the transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee (R. 81, 129). ("R." refers to the record in the district court. Where the reference is to the entire docket item, the page number given refers to the first page of the item.) There is a separate rate committee for each state (R. 1279). MCTA performs the same functions with respect to North Carolina intrastate rates (R. 39, 131-132), as does NCMCA (R. 68, 130). There is cooperation and coordination among these rate bureaus in North Carolina, where all three operate. Pet. App. 8a.

SMCRC and MCTA also act as rate bureaus for interstate rates under agreements approved by the Interstate Commerce Commission (see 49 U.S.C. (Supp. V) 10706(b)). R. 40, 82-83. The ICC's jurisdiction over motor common carrier transportation services and rates is limited to interstate transportation, that is, movement across state lines (49 U.S.C. (Supp. V) 10521), and interstate rate practices are not at issue in this case.

Motor carriers operating within any one of the five states in which these rate bureaus have established agreed-upon rates—Alabama, Georgia, Mississippi, North Carolina and Tennessee—are subject to regulation by state commissions. Motor common carriers engaging in intrastate transportation of general commodities within any of these states are required by law to obtain certificates of public convenience and necessity from the regulatory commission of that state. Motor carrier rate regulation in the five states follows the same basic pattern: carriers must file their intrastate rates and proposed rate changes with the appropriate state commission; proposed rates take effect unless the commission sets them for hearing; if a hearing is ordered, the rates take effect only after they are approved or modified by the commission. See Pet. App. 3a-9a.

None of the five states imposes any statutory requirement that carriers propose rates in a concerted manner through rate bureaus. Pet. App. 10a-11a. At the time this lawsuit was filed, there was no mention in any statute of rate bureaus or rate agreements among intrastate carriers. Subsequently, North Carolina, Tennessee and Georgia adopted statutes dealing in some way with collective ratemaking procedures. None of these statutes, however, requires motor carriers to join rate bureaus or participate in collective rate agreements; they all allow a regulated carrier to file its own individual tariffs or, even if it is a rate bureau member, to refuse to adopt the rate agreed upon by the bureau members and to file an independent rate.[2]

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[2] In 1977, North Carolina enacted a statute that allows any carrier subject to the state commission's jurisdiction to submit "an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or

2. In November 1976, the government filed a complaint under Section 4 of the Sherman Act, 15 U.S.C. 4, to enjoin the continuing violation of Section 1 of the Sherman Act, 15 U.S.C. 1, by SMCRC, NCMCA, and MCTA. Pet. App. 63a-64a. No state agencies or state officials were named as defendants and the government did not seek to enjoin any state regulatory functions.[3] The complaint alleged that the rate bureaus and their co-conspirators were engaged in a

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charges" to the state public utility commission for approval and provides that agreements so approved are exempt from the state's antitrust laws. N.C. Gen. Stat. § 62-152.1(b) (1982). No such agreements are required to be submitted, and no agreement is to be approved unless the commission "finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure." *Id.* § 62.152.1(e). A 1980 amendment to the Tennessee Code authorizes the public service commission to establish "rate-making procedures for all classes of motor common carriers, *including* collective rate-making procedures" and requires that "all carriers party to * * * [a collective ratemaking] agreement shall be required to comply with [the established] rate-making procedures." Tenn. Code Ann. § 65-15-106(d) (1982) (emphasis added). A 1980 amendment to the Georgia Code provides that "the commission shall establish rate-making procedures for all motor common carriers, which procedures shall include, *but not be limited to*, collective ratemaking procedures" and that "[a]ll motor carriers shall be required to comply with [the established] rate-making procedures." Ga. Code Ann. § 46-7-18 (1982) (emphasis added) (formerly Ga. Code § 68-613 (1933)).

Neither Alabama nor Mississippi currently has any statute dealing with rate bureaus.

[3] Nevertheless, the district court allowed the National Association of Regulatory Utility Commissioners to intervene as a defendant to represent the regulatory commissions of the five subject states, and the attorneys general of the five subject states were invited to participate as amici curiae. Pet. App. 32a n.2.

continuing conspiracy to fix rates charged for intrastate for-hire transportation of general commodities within the five states in which the bureaus operate.[4]

The district court granted summary judgment for the government. The court first rejected the defendants' contention that their activities were immune from the antitrust laws under the "state action" doctrine derived from *Parker* v. *Brown*, 317 U.S. 341 (1943). Pet. App. 11a-24a. The court noted that none of the states required rates among competing carriers to be uniform; on the contrary, each state guaranteed to all carriers the right to charge rates lower than or different from their competitors' rates. *Id.* at 9a-10a. Nor did any state require that rates proposed by carriers "be formulated or published by rate conference." *Id.* at 11a. Indeed, the court noted that "it is conceded by all sides that the practice of joint rate publication is not expressly required by any statute, regulation or other legislative or administrative command of any of the subject states." *Id.* at 21a. Because "the practice [of fixing rates by private agreement] is nowhere compelled" (*ibid.*), the district court concluded that the restraint on competition resulting from the rate bureaus' collusive setting of proposed rates was attributable to private conduct rather than state action and was therefore not immune from the antitrust laws. *Id.* at 11a-24a.

The court also rejected (Pet. App. 24a-26a) the defendants' contention that their conduct was immunized by the so-called *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference* v. *Noerr Mo-*

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[4] The parties stipulated that the movement of general commodities by motor common carriers within these five states and the rates and charges assesssed for such movements "have a 'direct and substantial effect on interstate commerce' within the meaning of the Sherman Act" (R. 1268, ¶ 4).

tor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). See also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). The court then held that the collective intrastate rate agreements among the members of the three rate bureau defendants constituted per se violations of Section 1 of the Sherman Act. Pet. App. 26a-29a. In reaching this conclusion, the court rejected, on the basis of *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), the defendants' argument that they only proposed—and the state commissions actually fixed—intrastate trucking rates. The court ruled that the defendants' conduct "easily fits the classic description of a 'naked price restraint.'" Pet. App. 28a. By displacing competition with concerted pricing decisions within the "zone of reasonableness" allowed by the regulatory agencies, the court concluded, the rate bureaus had violated the Sherman Act "at its most sensitive spot." *Ibid.*

The final judgment (App., *infra*, 4a-5a) enjoined the three rate bureau defendants from entering into or maintaining any conspiracy to fix collective intrastate rates [5] or providing a forum for any discussion of collective rates. The provisions of the final judgment, however, permit the rate bureaus to continue to act as agents for intrastate carriers by publishing, in a single tariff if desired, rates independently arrived at by each competing carrier. In addition, each rate

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[5] The decree does not prohibit carriers who are parties to a joint rate—"a single rate applied jointly by two carriers to cover a shipment in which one carrier operates over only part of the route and the other carrier serves the remaining distance to the destination" (Pet. App. 42a n.11)—from agreeing on that rate. Thus the suggestion of amicus curiae American Trucking Association, Inc., that the court of appeals' decision will interfere with "interlining" (Br. 4) is plainly incorrect.

bureau is permitted to provide statistical data and advice—including justifications for an individual carrier's rates filed with a state agency—to any carrier wishing to avail itself of the rate bureaus' expertise in the compilation and publication of tariffs.

3. A panel of the court of appeals affirmed. Pet. App. 31a-60a. The court of appeals then agreed to rehear the case en banc and again affirmed.[6] *Id.* at 63a-93a. The court reasoned that the "state action" exemption did not apply because where a state has not compelled private parties to engage in anticompetitive conduct, but rather has afforded those parties the option of competing or colluding, their anticompetitive conduct is fairly attributable to private volition and thus not exempt from federal antitrust laws as state action. The court stated that *Parker* v. *Brown*, *supra*, "established the state action issue as a question of whether the challenged acts could be attributed to the state as sovereign." Pet. App. 66a. The court explained that the anticompetitive action of a private party is fairly attributable to the state—rather than to the private party itself—only if the activity is required or compelled by the state acting as sovereign. *Id.* at 66a-69a.

The court noted that compulsion might not be required when public defendants, rather than private parties, seek to invoke the state action exemption, because if a unit of government is carrying out a clearly articulated, actively-supervised state policy, there is a basis for attributing the acts of that governmental unit to the state. Pet. App. 70a-71a. But the court explained that compulsion is necessary when a private party is acting in an anticompetitive fashion (*id.* at 69a-70a; footnote omitted):

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[6] Judge Johnson wrote the majority opinion for both the panel and the en banc court.

> [W]hen a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state * * * .
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> * * * * *
>
> So long as the state merely allows, but does not compel, anticompetitive conduct, the decision to adopt such conduct remains that of the individual and is within the scope of the Sherman Act. Regardless of how strongly a state may wish to remove private action from the Act's jurisdiction, it will not succeed unless it structures a program so as to make individual actions the actions of the state itself—by means of the mechanism of compulsion.

The court also noted that "if a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time." Pet. App. 70a n.9. Finally, the court of appeals pointed out that this Court has consistently ruled that "state authorization, approval, encouragement, or participation in restrictive private conduct does not confer antitrust immunity" and that there is no significant distinction between such state activity and the situation presented here—where "a state grants private parties the option of participating in a scheme of state supervision." *Id.* at 77a.

The court of appeals also rejected the defendants' *Noerr-Pennington* contention, endorsing the district court's explanation that the " 'coordinating and fixing of rates' " is a prohibited anticompetitive activity quite distinct from " 'presenting the collectively set

rates to the state commissions' "; only the latter activity is arguably protected by the *Noerr-Pennington* doctrine. Pet. App. 43a-44a, quoting *id.* at 25a; see *id.* at 80a. The court of appeals also affirmed the district court's holdings that the defendants had violated the Sherman Act and that the Interstate Commerce Act did not create an implied immunity for the defendants' conduct. See *id.* at 40a, 45a-51a, 80a & n.20.

Four judges dissented. Judge Hill, in the principal dissent,[7] acknowledged that the court's "conclusion that compulsion is an essential element of the immunity for a private defendant certainly is plausible." Pet. App. 81a. But he urged that language in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), required the court to extend state action immunity to any private party acting consistently with a clearly articulated state policy the implementation of which is actively supervised by the state. Pet. App. 81a, 83a.

ARGUMENT

1. Petitioners do not dispute the conclusion, reached by both courts below, that the challenged collective rate agreements constitute price fixing that would ordinarily be per se unlawful under the Sherman Act. Petitioners contend, however, that the agreements are exempt from the Sherman Act under the "state action" doctrine (Pet. 8-15), even though they do not dispute the conclusion—reached by the district court, the panel, and the en banc court of appeals—that no state law compels carriers to reach such agreements. Petitioners' contention is essentially

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[7] Judge Hill had also dissented from the panel decision. Pet. App. 52a-60a.

that such price fixing, while not compelled by any state, is nevertheless exempt from the antitrust laws because it is generally consonant with state policy. See *id.* at 6, 13-14. As the court of appeals recognized, this contention is foreclosed by the decisions of this Court and by the logic of the "state action" exemption, both of which deny state action immunity to private conduct unless it is compelled by the state.

a. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court unanimously held that when a private party seeks to invoke the state action exemption, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity *is required by the State* acting as sovereign." *Id.* at 790 (emphasis added). Because the State of Virginia did not require a minimum fee schedule for attorneys, the Court held that the promulgation and use of such a fee schedule by associations of private attorneys was not immune from challenge under the antitrust laws. *Id.* at 790-792. The Court explicitly rejected the defendants' argument that they could invoke the state action exemption because their activities "complemented the objective" of the state or were "prompted" by state action. The Court firmly stated that this was "not enough." *Id.* at 791. "[A]nticompetitive activities must be *compelled* by direction of the State acting as a sovereign" in order for private defendants to claim state action immunity. *Ibid.* (emphasis added).

In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), the Court reiterated this holding. *Id.* at 593 n.28. Each of the opinions in *Cantor* specifically noted, and endorsed, the "carefully drafted language in the *Goldfarb* opinion" (*id.* at 624 (opinion of

Stewart, J.)), holding that a private party's anti-competitive conduct does not fall within the state action exemption unless the state compels it. See *id.* at 600 & n.41 (plurality opinion); *id.* at 604 (Burger, C.J., concurring); *id.* at 609 (Blackmun, J., concurring); *id.* at 623-626 (Stewart, J., dissenting). Anything short of compulsion, the Court explained, is not sufficient to warrant applying the state action exemption to private conduct: "The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.* at 592-593 (footnotes omitted). A private party would not be entitled to state action immunity from the antitrust laws, the Court held, if "notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Id.* at 593. Since the private utility defendant in *Cantor*—and not the state—made the decision to institute the challenged conduct, this Court held that the privately imposed restraint at issue was not shielded by the state action exemption. *Id.* at 592-598.

b. The compulsion requirement of *Goldfarb* and *Cantor* follows directly from the rationale of the state action exemption. In *Parker* v. *Brown*, 317 U.S. 341 (1943), where the Court first articulated the exemption, the Court noted that Congress intended the Sherman Act to be a broad prohibition on restraints imposed on competition by private conduct; but the Court concluded that the Act was not intended to prohibit a state from restraining or eliminating competition. The Court reasoned that in the absence of a clear congressional direction, it should not interpret

the Sherman Act to prohibit "state action or official action directed by a state." *Id.* at 351. At the same time, however, the Court emphasized that the states may not immunize private restraints of trade from the Sherman Act: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351. See also *Northern Securities Co.* v. *United States*, 193 U.S. 197, 346 (1904); *Cantor*, *supra*, 428 U.S. at 592-593.

It follows that a court, in deciding whether certain conduct is immunized by the state action doctrine, must determine "whether the challenged acts could be attributed to the state as sovereign" (Pet. App. 66a) or instead constitute essentially private conduct. Where a private restraint is compelled by the state, the private party's action is fairly viewed as mere obedience to the *state's* decision to displace competition. But if private conduct is not compelled by the state—if it is merely allowed—the state has not made the decision to displace competition; it has left it to private parties to decide whether or not they will conform their conduct to the federal antitrust laws.

In this situation, any restraint resulting from private conduct fairly may be attributed to the private parties themselves. See *Cantor*, *supra*, 428 U.S. at 593-595. Because the state may not frustrate federal antitrust policy by "authorizing" private parties to compete or not as they wish, the private conduct, even if authorized by the state, is subject to the federal antitrust laws. Moreover, as the court of appeals noted, where the decision to compete or not is left to the private party, it can comply with both the federal antitrust laws and state regulatory laws; thus there is no actual conflict between state and federal law,

and applying federal antitrust law cannot frustrate the implementation of the state regulatory scheme. See *Cantor, supra*, 428 U.S. at 595. Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 463 (1969).[8]

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[8] As the court of appeals noted, this rationale also explains the standards that apply when alleged anticompetitive conduct by a state governmental entity, rather than private parties, is at issue. In such cases, the threshold state action question still is whether that action is the result of the state's decision to displace competition with an alternative system of regulation that the state implements to protect the public welfare. The Court has recognized, however, that for practical reasons state legislatures often cannot delegate power to subordinate agencies by expressly compelling the agencies to perform specific tasks by precisely described means; instead, the states often must delegate power to subordinate government units by giving them some discretion in implementing state policies that have been expressed in more general terms. See generally *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (plurality opinion); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51 (1982).

Accordingly, the Court has not required that the action of a state agency be compelled by the state legislature in order to be attributable to the state and therefore within the state action exemption. Rather, conduct of a municipality or a state agency which implements a clearly articulated state policy to displace competition with regulation is attributed to the state. *City of Lafayette, supra*, 435 U.S. at 410, 413, 415; *City of Boulder, supra*, 455 U.S. at 55. Even in the case of state instrumentalities, however, mere neutrality on the part of the state is not sufficient to confer state action immunity. *Ibid.* Unless there is a clearly articulated state policy, the action of a subordinate state agency is not "state action," because subordinate state entities are not themselves "the state as sovereign." *City of Lafayette, supra*, 435 U.S. at 414-415; *City of Boulder, supra*, 455 U.S. at 53-54.

In addition to requiring that subordinate state agencies acting to displace competition do so only in furtherance of a clearly articulated state policy, the Court has held that it is not

Here, as we noted, petitioners do not contend that any state compelled the challenged anticompetitive conduct. The states have merely given carriers the option of engaging in such conduct. Thus, the decision in favor of what amounts to private price fixing was not made by the states in the exercise of their sovereign powers; it was made by the carriers, and the fact that a state authorized that choice is, as the Court has repeatedly emphasized, not sufficient to confer state action immunity. Within the state regulatory regime, motor carriers can engage in either collusive conduct—rate agreements like those challenged here—or competitive conduct—the submission of individual tariffs. In this area, state law has given carriers the option to choose between competition and collusion. This is the same thing state law does in areas it leaves unregulated. And when the state gives regulated private parties the choice between competition and collusion, just as when it leaves them unregulated, the Sherman Act requires the choice of competition.[9]

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enough for the state merely to displace competition. It must replace it with some form of governmental regulation rather than leaving implementation of its policy solely to the discretionary acts of private parties. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

[9] Petitioners are incorrect in insisting (see Pet. 11, 13) that the relationship between the private parties and the state in this case resembles that in *Parker*. In *Parker*, the state decided to impose an anticompetitive regime; that it made this decision at the behest of private parties was not considered material. Here, the state regulatory regimes permit carriers to propose rates in either a competitive or a collusive fashion, and the carriers chose to collude. Collusion was not imposed on them by the states. See Pet. App. 67a-68a n.6.

Petitioners do not discuss *Goldfarb*, *Cantor*, or the logical basis of the state action exemption. Instead, they rely on language in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In that case, the Court said that a restraint on competition falls within the state action exemption only if it is " 'clearly articulated and affirmatively expressed as state policy' [and] * * * the policy [is] * * * 'actively supervised' by the state itself." *Id.* at 105, quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.). Petitioners appear to contend that the rate agreements satisfy this test and therefore are entitled to immunity under the state action doctrine.

Midcal, however, was a suit seeking to enjoin the operation of a state statute; as we have explained (pages 13-14 note 8, *supra*), state compulsion (although it was in fact clearly present in *Midcal*) is not always necessary to permit a unit of government to invoke the state action exemption.[10] Contrary to petitioners, *Midcal* did not alter the requirement that a private party's action must be compelled by the state if that party is to take advantage of the state action exemption. Indeed, the Court in *Midcal* specifically quoted from *Goldfarb*: " 'It is not enough that * * * anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign.' " 445 U.S. at 104, quoting *Goldfarb*, *supra*, 421 U.S. at

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[10] In *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51 n.14 (1982), the Court specifically noted that the *Midcal* description of the state action exemption dealt with "anticompetitive restraints engaged in by state municipalities or subdivisions."

791. The Court in *Midcal* also expressly relied on *Goldfarb* and *Cantor*, among other decisions, as "establish[ing]" the standard respondents invoke (445 U.S. at 105); thus the *Goldfarb* and *Cantor* compulsion requirement cannot be inconsistent with *Midcal*. And nothing in the *Midcal* opinion suggests that the Court was reconsidering the requirements it had previously established for private parties seeking to invoke the state action exemption. As the court of appeals noted, and as we have explained, while a clearly articulated and enforced state policy of regulation is sufficient to permit a unit of government to invoke the state action exemption, the *Parker* v. *Brown* policy of federalism on which the state action exemption is based requires that a private party show that the state compelled its anticompetitive act.[11]

c. Petitioners also suggest that, as a matter of public policy, the state action exemption should be extended to cover their rate agreements. If, as petitioners contend (Pet. 7-8), rate agreements are essential to permit the states effectively to regulate motor carrier rates, the states are free to require such agreements; but it is undisputed that none of the subject states has done so. Petitioners are correct in pointing out that there would presumably be less competition if the states did so, since some carriers now file individual rates. But as the court of appeals explained, "it is the source of the decision to compete—not the extent of competition—which determines whether state action exists." Pet. App. 79a. That is because, as we have explained, the state action exemption is based on principles of federalism:

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[11] See Pet. App. 76a: "[R]eading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*."

Congress did not intend to prohibit states' decisions to displace competition, but it did intend to prohibit such decisions when made by private persons.

d. Petitioners' contention that there is a conflict among the circuits (Pet. 15-17) is incorrect. Petitioners acknowledge (*id.* at 17) that *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), involved only a municipal defendant and therefore did not address the question whether state compulsion is required to establish a private party's state action immunity. In *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), cert. denied, 456 U.S. 1011 (1982), the state action holding was an alternative basis for the decision (see 670 F.2d at 822), and the language quoted by petitioners (Pet. 16) is from a footnote discussion not essential to the state action holding. Moreover, the decision in *Turf Paradise* is not inconsistent with the court of appeals' holding here. In that case, the challenged agreement allocated racing dates for the one race track in Phoenix. State law prohibited two race tracks from operating simultaneously in the same county, and where two or more applicants sought the required permits for the same date, they were directed by statute to resolve the conflict by private agreement. If no agreement was reached, the state racing agency would allocate days, with current permit holders given preference for days in which they had permits in previous years. 670 F.2d at 816-817. As the court of appeals analyzed the case, the state had left no room for competition: either the competitors were to settle the matter by agreement, or the state would settle it by fiat. That situation contrasts sharply with the present case, where the states have not precluded motor carriers from competing. Notably, in *United States*

v. *Title Insurance Rating Bureau, Inc.*, 700 F.2d 1247 (9th Cir. 1983), petition for cert. pending, No. 83-154, the Ninth Circuit considered it dispositive of a state action claim that the state law—like the state laws here—did "not require uniform rates: it allows a title insurer to file independent rates," (700 F.2d at 1253). *Title Insurance Rating Bureau* did not cite *Turf Paradise.*

In *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711 (D.D.C. 1979), aff'd per curiam, No. 79-1658 (D.C. Cir. July 3, 1980), cert. denied, 450 U.S. 914 (1981), the principal issue was the state action immunity to be accorded to certain actions by government agencies; the district court conferred immunity on the challenged actions of private parties because it viewed them as ancillary to the state agencies' lawful monopoly. See 475 F. Supp. at 724. The remark quoted by petitioners (Pet. 16) was made in a casual introduction to the district court's discussion of state action and was not integral to its analysis; in any event, the District of Columbia Circuit's summary affirmance cannot be interpreted as reflecting a considered view at odds with that of the court of appeals in this case.

2. Petitioners also contend (Pet. 9-11) that the Sherman Act should not be applied to state-regulated intrastate carriers' collective ratemaking because the Interstate Commerce Act provides an express and limited exemption for collective *interstate* ratemaking. But as the courts below concluded (Pet. App. 40a n.9, 80a n.20), the Interstate Commerce Act creates no exemption, express or implied, for collective intrastate ratemaking, and it does not authorize

the states to confer such immunity.[12] Petitioners point to nothing in the Interstate Commerce Act suggesting that such an immunity exists. Any differences in the regulatory regimes proposed for interstate and intrastate rates are simply the result of choices made by Congress.[13]

3. Finally, petitioners contend (Pet. 19-20) that under the *Noerr-Pennington* doctrine, the Sherman Act does not apply to their price fixing. In order to accept this contention, the Court would have to overrule *Georgia* v. *Pennsylvania R.R.*, *supra*, which held that submission to a regulatory agency of collectively established rates does violate the Sherman Act; while *Georgia* v. *Pennsylvania R.R.* was decided before *Noerr*, nothing in *Noerr* suggests that the Court intended to overrule the earlier decision.

Moreover, in *Noerr* itself the Court distinguished between combinations of private parties for the purpose of "persuad[ing] the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly," which are not prohibited by the Sherman Act, and "combina-

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[12] By contrast, the McCarran-Ferguson Act, for example, provides express antitrust immunity for "the business of insurance" to the extent regulated by state law. 15 U.S.C. 1012.

[13] In any event, these differences are likely to be sharply reduced in the future. While the Interstate Commerce Act currently permits agreements among carriers on rates for shipments in interstate commerce, 49 U.S.C. (Supp. V) 10706(b)(3)(D) provides that the ICC will not be allowed to approve any agreements among motor carriers that "provide for discussion of or voting upon single-line rates on or after January 1, 1984." In explaining this amendment, the House Report stated that such rate agreements are harmful to consumers because they tend to protect inefficient carriers. H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 27 (1980).

tions ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom * * * through the use of such devices as price-fixing agreements," which do violate the Sherman Act. 365 U.S. at 136. This case involves the latter kind of combinations. The motor carriers whose agreements are at issue here are not engaging in "mere attempts to influence the passage or enforcement of laws" (*id.* at 135); they are operating within a state regulatory scheme in a way designed to reduce competition by fixing prices among themselves. The mere fact that their anticompetitive behavior also brings them into contact with state regulators at some point does not entitle them to antitrust immunity. See *Cantor*, *supra*, 428 U.S. at 601-602 (opinion of Stevens, J.); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785, 807 (2d Cir. 1983), petition for cert. pending, No. 82-2128 ("a mere *incident* of regulation—the tariff filing requirement—is [not] tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*").[14]

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[14] Moreover, immunizing the rate agreements would thwart the principal objective of the *Noerr-Pennington* exemption—to protect the flow of information to public officials. See *Noerr*, *supra*, 365 U.S. at 137. The collusive activities at issue here limit the flow of information by substituting a single proposal for the diversity of views that regulators would otherwise receive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 76-1909A

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.;
MOTOR CARRIERS TRAFFIC ASSOCIATION, INC.;
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
DEFENDANTS

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, INTERVENORS

[Filed Sept. 13, 1979]

FINAL JUDGMENT

Plaintiff, United States of America, and Defendants, Southern Motor Carriers Rate Conference, Inc., ("SMCRC"), Motor Carriers Traffic Association, Inc., ("MCTA"), North Carolina Motor Carriers Association, Inc., ("NCMCA"), all having filed their respective Motions for Summary Judgment on August 1, 1978, and this court on March 20, 1979 having granted Plaintiff's Motion for Summary Judgment and denying all defendants' motions, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

1.

This court has jurisdiction over the subject matter and the parties here involved. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Sherman Act. (15 U.S.C. § 1).

2.

As used in this Final Judgment:

(a) "Tariff" means a publication containing one or more rates, charges, exceptions to the National Motor Freight Classification or alternative publication, rules, regulations, or other provisions or any combination thereof, of one or more common carriers together with supplements or looseleaf page amendments thereto, if any.

(b) "Rates" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service.

(c) "Carrier" means a common carrier of property by motor vehicle.

(d) "General Commodities" means all items of property described in the Southern Motor Carriers Rate Conference, Inc., Alabama Intrastate Tariff 306; Georgia Intrastate Tariff 301 series; North Carolina Intrastate Tariff 304; and Tennessee Intrastate Tariff 305; and all respective supplements thereto and reissuances thereof; the Motor Carriers Traffic Association, Inc., North Carolina Intrastate Tariff 3-H and all respective supplements thereto and reissuances thereof; the North Carolina Motor Carriers Association, Inc., North Carolina Intrastate Tariff 10-H and all respective supplements thereto and reissuances thereof.

(e) "Intrastate for-hire transportation" means the pickup or receipt, transportation and delivery of property for compensation by a motor carrier authorized by a state regulatory agency to engage therein and to serve the general public on a common carrier basis.

(f) "Collective Rates" means any rate or charge, other than a "joint rate," established under any contract, agreement, understanding, plan, program, combination, or conspiracy between two or more competing carriers.

(g) "Joint Rate" means any rate established by two or more carriers, covering an interline movement of property over the routes of the carriers directly participating in the interline movement.

(h) "Intrastate Rate Committee" means any group of carriers' agents, employees or other representatives which formally or informally meet with defendants' employees to discuss or vote upon a change or changes in rates, fares, classifications, rules or regulations published in the intrastate tariffs issued by defendants.

(i) "Docket" means an informational bulletin published by a "tariff publishing agent" to inform and facilitate discussion between competing carriers with respect to the filing of rates for the intrastate for-hire transportation of property.

(j) "Tariff Publishing Agent" means a person duly authorized by a carrier, via a power of attorney on file with a state regulatory commission, to publish and file rates and provisions for that carrier's account in tariffs published in the name of the agent.

(k) "Tariff Watching Service" is a service provided by a tariff publishing agent whereby the agent notifies carriers subscribing to its service of competing carrier and rate bureau changes in their existing

tariffs and rates which have been filed with a state regulatory commission.

(l) "Intrastate rate" means any rate charged by a carrier for the intrastate for-hire transportation of property solely within a state and subject to regulation by that state.

(m) "Person" means any natural person, firm, partnership, association, corporation, or any other business or legal entity.

3.

The provisions of this Final Judgment are applicable to the defendants herein and shall also apply to each of the defendants' officers, directors, agents, employees, subsidiaries, successors, and assigns and to all other persons in active concert or participation with them who shall have received actual notice of this Final Judgment by personal service or otherwise; provided however, that nothing in this Final Judgment shall be read or construed to restrain or prohibit any state body, official or employee from acting in accordance with or pursuant to valid statutory authority.

4.

Defendants SMCRC, MCTA, and NCMCA are hereby enjoined and restrained from:

(a) Entering into, adhering to, maintaining, or claiming any rights under, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize or maintain collective rates charged by competing carriers for the intrastate for-hire transportation of property;

(b) Maintaining any intrastate rate committee to consider, pass upon or discuss intrastate rates or rate proposals;

(c) Inviting, coordinating or providing a forum, including publication of a docket, for any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property;

(d) Providing information to any carrier about rate changes ordered by any other carrier employing the publishing services of any defendant prior to the time at which such rate change becomes a matter of public record;

(e) Knowingly publishing or causing to be published any docket, tariff or tariff supplement which was the result of any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property; or

(f) Communicating directly or indirectly any information concerning intrastate rates for competing motor carriers where the purpose or reasonably foreseeable effect of such communication is to maintain or renew, directly or indirectly, any contract, agreement, plan, program, combination or conspiracy to fix, stabilize or maintain rates charged by competing carriers for the intrastate for-hire transportation of property;

(g) Provided however, that nothing in this Final Judgment shall prevent any defendant from engaging in any activity which is judicially or statutorily exempted from the operation of the federal antitrust laws.

5.

Defendants are ordered and directed within six (6) months following the date of the entry of this Final Judgment:

(a) To cancel all tariffs (and any effective supplements thereto) on file with the state regulatory agen-

cies of Alabama, Georgia, Mississippi, North Carolina and Tennessee establishing rates and services for the intrastate transportation of general commodities and to take such action with the said regulatory commissions as may be necessary to effectuate cancellation and withdrawal of said tariffs.

(b) To terminate all previously executed powers of attorney and rate and tariff service agreements between a defendant and any carrier utilizing the services of that defendant authorizing the publication and/or filing of intrastate collective rates within the States of Alabama, Georgia, Mississippi, North Carolina and/or Tennessee.

(c) To cancel those provisions of their respective articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy which have the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Final Judgment.

6.

(a) For those carriers who were or are members of defendants or have participated in defendants' collective tariffs, and who wish to continue to use their services as tariff publishing agents, defendants must offer an "open season" for a period of six months from the date of the entry of this Final Judgment to facilitate the filing of rates independently arrived at by each such carrier. During the "open season," defendants must obtain from each carrier using defendants' services as tariff publishing agents an affidavit which affirms that the new rates filed on behalf of that carrier were arrived at unilaterally by the independent action of that carrier during the "open season" and were not collectively established.

(b) Defendants must not take any steps or adopt any procedures which would have the effect of influencing any carrier from acting independently in establishing its rates in compliance with subsection (a) of this Article 6.

(c) Each defendant may initiate a tariff watching service, but no agreement between any defendant and a carrier for said watching service may include a provision for instituting automatic changes to rates on file for said carrier.

(d) Each defendant may issue one or more tariffs in which the independent rates of competing carriers are published.

(e) Each defendant may provide statistical and other economic data and advice to any carrier wishing to avail itself of defendants' expertise in the compiling and publishing of tariffs, including rate justifications for that carrier's independent rate proposal filed with a state agency.

(f) Each defendant may charge carriers for expenses incurred on their behalf.

7.

Defendants are further ordered and directed:

(a) To take reasonable steps for dissemination of, education as to, and compliance with this Final Judgment involving their respective officers, directors, employees and agents having any responsibility in connection with analyzing or publishing tariffs published by defendants, advising such persons of their obligation under this Final Judgment. At a minimum defendants must provide each such officer, director, employee and agent within thirty (30) days of the entry of this Final Judgment with a copy of this Final Judgment, a statement of that defendant's compliance

policy under the Final Judgment in the form of an appropriate company manual or memorandum and shall obtain a written statement from each such officer, director, agent, or employee evidencing the receipt and understanding of these documents, such statements to be retained in the files of the defendants.

(b) For a period of five (5) years from the entry of this Final Judgment, each defendant must provide each new officer, director, agent and employee with a copy of this Final Judgment and a statement of the defendant's compliance policy hereunder in the form of an appropriate company manual or memorandum and must provide any carrier desiring to utilize defendant's services as a Tariff Publishing Agent with a copy of this Final Judgment. Each defendant must obtain a written statement from each officer, director, employee, agent, and carrier evidencing receipt and understanding of the applicable documents, such statement to be retained in the files of the defendant.

(c) Within one hundred and eighty (180) days after the date of the entry of this Final Judgment, each defendant shall file an Affidavit of Compliance with the court, and serve a copy thereof to plaintiff, reciting the steps taken to comply with this Final Judgment.

8.

For the purpose of determining or securing compliance with this Final Judgment, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division or his agent, subject to any legally recognized privilege:

(a) On reasonable notice to any defendant made to its principal office duly authorized representatives of the Department of Justice shall be permitted:

(1) Access, during office hours of said defendant, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of said defendants and without restraint or interference from it, to interview officers, directors, employees or agents of the defendants, any of whom may have counsel present, regarding any matters contained in this Final Judgment.

(b) The defendants shall submit such reports in writing, under oath if requested, with respect to matters contained in this Final Judgment as may from time to time be so requested.

No information or documents obtained by the means permitted in this Section 8 shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the executive branch of the plaintiff, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as required by law.

If at any time information or documents are furnished by a defendant to plaintiff, the defendant represents and identifies in writing the material in any such information or documents of a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to said defendant prior to divulging such

material in any legal proceeding (other than a Grand Jury proceeding) to which that defendant is not a party.

9.

Jurisdiction is retained by the court for the purpose of enabling any of the parties to this Final Judgment to apply to this court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

10.

This Final Judgment shall remain in effect for a period of five (5) years from the date upon which it is entered by the court.

IT IS SO ORDERED.

This, the 11th day of September 1979.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

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